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June 8, 2001

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Ex Parte: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 - CC Docket No. 96-98

Dear Ms. Salas,

On June 7, 2001, the attached e-mail correspondence from Ed Shakin of Verizon was sent to Kyle Dixon of Chairman Powell's office regarding the Commission's obligations with respect to determining those network elements that should be unbundled under both the terms of the Act and the Supreme Court's decision in *Iowa Utilities Board.*

Pursuant to Section 1.1206(a)(1) of the Commission's rules, and original and one copy of this letter are being submitted to the Office of the Secretary. Please associate this notification with the record in the proceeding indicated above. If you have any questions regarding this matter, please call me at (202) 515-2530.

Sincerely,

W. Scott Randolph
Director - Regulatory Matters

cc: Kyle Dixon

"SHAKIN, EDWARD H." <EDWARD.H.SHAKIN@bellatlantic.com> on 06/07/2001 04:24:00 PM

To: kdixon@fcc.gov
cc: srandolph@dcoffice.gte.com
Subject: legal standard for unbundling

At our recent meeting concerning reconsideration of the Commission's requirements on unbundling local switching, you asked if the Commission could require the unbundling of an element even when the Commission found that competing carriers were not impaired without reliance on that element to offer competing service. Attached is a brief response to that question. Please contact me with any questions or if you wish to discuss this further.

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At our recent meeting concerning reconsideration of the Commission's requirements on unbundling local switching, you asked if the Commission could require the unbundling of an element even when the Commission found that competing carriers were not impaired without reliance on that element to offer competing service. We believe that the Commission may not do so consistent with the terms of the Act and the Supreme Court's decision in *Iowa Utilities Board.*

In the original UNE order, the Commission did not rely on section 251(d)(2) in determining what network elements it would require to be unbundled. It was that failure which the LECs challenged all the way to the Supreme Court. In the brief defending its decision, the FCC argued that "section 251(d)(2) does not even direct the Commission (as the incumbents suggest) to give the 'necessary' and 'impair' standards dispositive weight." FCC S. Ct. Reply Br. at 43. Rather the Commission claimed that section 251(d)(2) merely "directs the Commission to 'consider' those factors, 'at a minimum,' '[i]n determining what network elements should be made available.'" *Id.* at 43-44.

It was this position that the Supreme Court rejected in its order. The Court held that section 251(d)(2) imposes "clear limits" on unbundling. 525 U.S. at 366, 397 (1999). The Court stressed that, if Congress had intended to create the kind of unlimited access to incumbents' property that the FCC envisioned, "it would not have included section 251(d)(2) in the statute at all. It would have simply said (as the Commission in effect has) that whatever requested element can be produced, must be provided." 525 U.S. at 390.

In particular, the Court found that "the Act requires the FCC to apply *some* limiting standard [in the designation of unbundled elements], rationally related to the goals of the Act, which it has simply failed to do." 525 U.S. at 388. There is simply no way to understand the Court's reversal of the prior FCC decision as anything other than a decision that the FCC's authority to require unbundled elements is specifically limited by section 251(d)(2). As a result, at a minimum, the FCC may not require an element to be unbundled absent a finding that competitors would be impaired without access to that element.

While it does not purport to do so in the UNE Remand Order, the Commission does include dicta suggesting that it retains that right. Remand Order, ¶ 102. The Commission relies on the statutory language that the Commission shall "consider at a minimum," the limits of section 251(d)(2). But the "at a minimum" language only means that the Commission need not require unbundled access to every element for which it finds that competing carriers would be impaired. There may be other pro-competitive reasons to not require such unbundling. Indeed, because unbundling discourages facilities-based competition, and, as the Commission recognized, discourages investment in new technologies, there are sound public policy reasons to limit unbundling requirements as much as possible. But the Commission may not do the converse; it may not require additional elements to be unbundled where competitors are not impaired. This limit is not just good policy, it is the law of the land as interpreted by the Supreme Court.